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SUPREME COURT, U.S.

No. 80-6519

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

MAJOR HENRY JOHNSON, JR., PETITIONER

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT

PETITIONER'S REPLY BRIEF

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July 1, 1981

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The respondent, in Part III of its brief in opposition, suggests precisely the reason that this Court should grant a writ of certiorari and remand this matter for further consideration by the Virginia Supreme Court: In Edwards v. Arizona, ___ U.S. ____, 49 U.S.L.W. 4496 (No. 79-5269, May 18, 1981) (decided after the petition for writ of certiorari was filed in this case), this Court spoke directly to the issue raised by the second "question presented"[1] in the instant petition for writ of certiorari. The "conflicts" referred to in that question have been settled by Edwards, in favor of the position that the petitioner had urged.

In its review of the confession question, the court below assumed that the petitioner had asserted his right to counsel (App., p. A12), but yet did not look beyond the fact that, thereafter being advised of his Miranda rights in a new police initiated custodial interrogation, the petitioner signed a "waiver card" and gave an inculpatory statement (App., pp. A9-A13). Compare Edwards, supra, 49 U.S.L.W. at 4498: "a valid waiver... cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights."

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[1] The second "question presented" (Petition for writ of certiorari, p.ii) was: Whether this Court should settle a considerable conflict among the Courts of Appeal and state courts of last resort, and hold that the Fifth and Fourteenth Amendments to the Constitution require that a criminal defendant's confession be excluded from evidence when, prior to making the confession, he requested an attorney, and thereafter, before he had the opportunity to confer with his attorney, the police initiated a new custodial interrogation session and obtained an inculpatory statement.

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The Virginia Supreme Court found no merit in the petitioner's argument that, once the right to counsel had been asserted, the police could not initiate a custodial interrogation session until the opportunity to confer with counsel had been afforded (App., pp. A11-A12). Edwards, supra, 49 U.S.L.W. at 4498, seems to compel a contrary view to that taken by the court below.

As the respondent notes, the factual contexts in which the instant case and the Edwards case arose are somewhat different, in that, inter alia, Edwards made his request for counsel to a police officer and the petitioner made his to a judge at arraignment. Notwithstanding these differences, the similarity remains: After the petitioner here invoked his right to counsel, the police initiated a new interrogation session. In Edwards this Court

> emphasize[d] that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Id., 49 U.S.L.W. at 4498.

The respondent suggests (Brief in Opposition, p.17) that it would be "premature at best to grant review," without giving "time for lower courts to interpret and apply" Edwards. By granting the writ, vacating and remanding this case to the Virginia Supreme Court for consideration in light of Edwards, this Court will avail the court below of just such an opportunity. Though the respondent asserrts (Brief in Opposition, pp. 16-17) that the questions presented are not worthy of review on certiorari, the legal issues presented by the confession question here are substantially identical to those found meritorious by this Court in Edwards.

The respondent also argues vigorously (Brief in Opposition, pp. 9-10) that the petition for certiorari should not

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be considered because it was not timely filed under this Court's Rules. Due solely to counsel's neglect in believing (until too late) that the time requirements of former Rule 22 obtained, the petition was, in fact, some 30 days out of time.

The time requirement of Rule 20.1 is not jurisdictional, Sanabria v. United States, 437 U.S. 54, 62, n. 12, 98 S.Ct. 2170, 57 L.Ed. 2d 43 (1978); Schacht v. United States, 398 U.S. 58, 63-65, 90 S.Ct. 1555, 26 L.Ed. 2d 44 (1970), "and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." Schacht, Id. Petitioner here urges that--especially in view of the fact that the Edwards decision so strikingly speaks to a question raised in the certiorari petition--the ends of justice would be well served by consideration of this petition. It is presumed that if the Court declines to review this petition due to its untimeliness, the petitioner can and would collaterally assert his Edwards argument, assigning in his collateral review counsel's failure to timely present the question to the Supreme Court. Petitioner's counsel suggests that neither the ends of justice nor the orderly transaction of judicial business, Schacht, supra, 398 U.S. at 64, would be well served by such circuitous review. Rather, the petitioner urges that, upon consideration of the petition, the writ be granted, the judgment below be vacated, and the matter remanded to the Virginia Supreme Court for reconsideration in light of Edwards.

Respectfully submitted,

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